

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TINA D. RAY)	
Claimant)	
)	
VS.)	Docket Nos. 1,029,200 and
)	1,029,201
HALLMARK CARDS, INC.)	
Self-Insured Respondent)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the July 31, 2008, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on November 5, 2008. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. John D. Jurcyk, of Roeland Park, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant had a 7 percent permanent partial impairment to her right upper extremity as a result of a series of accidents that occurred as a result of her employment with respondent. The ALJ's Award bears only Docket No. 1,029,201. However, the parties agreed that Docket No. 1,029,200 was consolidated with Docket No. 1,029,201 for trial and that the two claims should be combined for award into a single series of accidents ending April 25, 2006.

The Board has considered the record and adopted the stipulations listed in the Award. The Board also considered the court ordered independent medical examination (IME) report of Dr. Peter V. Bieri dated November 27, 2007, the IME report of Dr. Steven Joyce dated October 12, 2006, and the transcript of the Preliminary Hearing held July 31, 2006. During oral argument to the Board, the parties agreed that the date of accident for computation purposes is April 25, 2006.

ISSUES

Claimant requests review of the ALJ's finding that she is limited to a 7 percent functional disability to her right upper extremity (shoulder). She requests that the Board award her compensation for permanent functional impairment to her neck and left shoulder in addition to her right shoulder. In the event the Board finds she should only be awarded

for the permanent impairment in her right shoulder, claimant requests the Board enter an award of 38 percent, consistent with the opinion of Dr. Lynn Curtis, with a deduction of 10 percent for her preexisting impairment.

Respondent requests that the Board adopt the opinion of Dr. Steve Joyce and find that claimant had no additional permanent impairment to her right upper extremity related to this series of accidents. In the alternative, respondent requests that the Board affirm the ALJ's award of 7 percent permanent partial impairment to the right upper extremity based on the opinion of Dr. Peter Bieri.

The issue for the Board's review is: What is the nature and extent of claimant's impairment?

FINDINGS OF FACT

Claimant worked for respondent for 16 years. In June 2003, claimant had surgery on her right shoulder performed by Dr. Craig Vosburgh as a result of a work-related injury. She had physical therapy and was able to return to work with restrictions. Eventually she returned to her regular duties with no restrictions. Dr. Vosburgh rated her disability in 2003 at 10 percent to the right upper extremity. Claimant testified that after the 2003 surgery, she was able to move her right shoulder without pain but she did not have full range of motion. She did not have a problem with her left shoulder in 2003.

Respondent's nurse's notes indicate that claimant reported injuries resulting from a fall at her home in October 2005. She claimed she had injured her left wrist and hand and had pain in the area of her ribs. She was off work for a period of time for those injuries. She denies injuries to her neck and back from that fall.

Claimant is now alleging problems with her right shoulder, left shoulder, back and neck as a result of a series of accidents from approximately December 2005 to April 25, 2006, her last day worked at respondent. She claims her shoulder got worse after her June 2003 surgery because of repetitive motion she performed in running a machine at work, causing her right shoulder to start aching and burning. Her left shoulder also started to hurt, which she attributed to over-compensating for her painful right shoulder. She reported her problems to the company nurse and was given Advil and ice packs, which did not improve her condition. She continued to complain about her condition to the plant nurse and on April 25, 2006, made a claim for medical treatment. She was referred to Dr. Vosburgh, whom she saw on May 18, 2006. She complained to him that her right shoulder was stiff and burning and that she could not raise it very high without shooting pains. At that time, Dr. Vosburgh diagnosed her with rotator cuff tendinitis of the right shoulder and treated her conservatively with medication and physical therapy. Her condition did not improve, even after having a cortisone injection, so Dr. Vosburgh ordered an MRI of her right shoulder. The MRI showed she had a thickening of the rotator cuff and a tear, which Dr. Vosburgh told her was inoperable.

Claimant testified that she complained to Dr. Vosburgh about her left shoulder, back and neck, but he was only authorized to treat her right shoulder. Claimant has pain, popping and creaking in her left shoulder, and also has less flexibility and loss of strength in her left shoulder. She testified that she has constant stiffness in her neck. She is also complaining about back pain, which she claims she has had for many years and which she attributes to her work at respondent.

Dr. Lynn Curtis examined claimant on May 23, 2006, at the request of claimant's attorney. Claimant told Dr. Curtis that she developed pain in both shoulders between December 2005 and January 2006, with her right shoulder being worse than her left. After examination, Dr. Curtis found that claimant was not at maximum medical improvement (MMI). Thereafter, he undertook to treat claimant.¹

Claimant was seen by Dr. Steve Joyce, an orthopedic surgeon, on October 12, 2006, for an IME that had been ordered by the ALJ. Upon examination, Dr. Joyce found that claimant had positive physical findings of impingement and weakness on testing of the rotator cuff on the right. Dr. Joyce recommended that claimant undergo a repeat arthroscopic examination, which was done on January 10, 2007. During the arthroscopic examination, Dr. Joyce observed a rotator cuff tear with impinging fibers, meaning it was not scar tissue but may have been a re-tear of the previously debrided rotator cuff. He debrided the area. He continued to treat claimant after the surgery, last seeing her on August 10, 2007.² At that time, she still had loss of range of motion and weakness on testing of her rotator cuff on the right. Nevertheless, he found that she was at MMI.

Although Dr. Joyce opined that claimant had a repeat injury to her right upper extremity, he did not believe the new injury changed her disability from her previous 10 percent rating. Based on the *AMA Guides*,³ he rated claimant's permanent partial impairment as 10 percent of the right upper extremity, the same rating as claimant received from Dr. Vosburgh after the June 2003 surgery.

Claimant was again examined by Dr. Curtis on September 6, 2007, at the request of claimant's attorney. He reviewed some of the medical records and performed a physical examination of claimant.

Upon examination, Dr. Curtis found that claimant had weakness in her left shoulder with external rotation and abduction at 30 degrees. Her left shoulder range of motion had

¹ By an Order for Compensation dated August 4, 2006, Dr. Curtis was designated to treat claimant "until further order or until certified as having reached maximum medical improvement."

² The ALJ authorized Dr. Joyce to treat claimant by his Order of November 1, 2006.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

improved but still had some abnormalities. She had moderate joint crepitation in her right shoulder. She had a positive compression test for her right AC joint. She had weakness in internal rotation of the right shoulder and abduction at 30 degrees. Her right shoulder range of motion was decreased. She had a positive facet loading test of her neck. She had nerve root irritability going into her left scapula with compression of her neck. Range of motion of her neck was mildly limited. He admitted that the loss of range of motion of her neck was caused partly by her bilateral trapezius spasms. He also admitted he did not know if claimant had any loss of range of motion of her neck after the 2003 surgery.

Using the *AMA Guides*, Dr. Curtis rated claimant as having a 5 percent permanent partial impairment to the body as a whole for her neck. For loss of range of motion of the left shoulder, he rated her left upper extremity at 10 percent. For her abnormal AC compression of the right shoulder, he rated at 5 percent of the right upper extremity. He rated her right upper extremity at 12 percent for crepitation, 8 percent for loss of range of motion, and 19 percent for chronic motor weakness, which combined for 38 percent of the right upper extremity. These ratings combined for a whole body permanent partial impairment of 25 percent. He did not deduct anything for claimant's previous impairment to her right upper extremity.

Dr. Curtis believed that the cause of claimant's impairment was her employment at respondent between December 2005 to 2006. He noted that claimant had returned to full duty employment following the 2003 injury to her right shoulder. Although she had restrictions after her 2003 surgery, she had worked back into her regular job. Dr. Curtis stated that claimant did not tell him about a fall she had at home in October 2005.

Dr. Peter Bieri examined claimant on November 27, 2007, at the order of the ALJ. He took a history from her concerning her 2003 surgery and her current complaints and treatment. Claimant reported to Dr. Bieri that her current symptoms occurred as the result of repetitive activity. She was not certain of a specific injury in December 2005 but told him her symptoms worsened in April 2006. She said she had some discomfort following her 2003 surgery but now had a significant increase in burning pain in her right shoulder. She complained of problems with shoulder level and overhead use. She also complained of pain in her left shoulder and neck, which she also attributed to work-related repetitive activity. She was unable to give him a specific onset date of symptomatology on the left.

Upon examination of claimant's right shoulder, Dr. Bieri found moderate tenderness anteriorly and superiorly radiating into the right deltoid. She had decreased resistance in flexion, abduction and external rotation. No atrophy was noted. Dr. Bieri's examination of claimant's cervical spine revealed no significant tenderness to palpation. Active range of motion was full and unrestricted. Examination of claimant's left shoulder showed slight discomfort about the left AC joint, with active and passive range of motion full and unrestricted.

Dr. Bieri opined that in December 2005 to April 2006, claimant suffered a work-related injury that had aggravated a preexisting rotator cuff tear involving the right shoulder. He noted that claimant had no apparent diagnostic or treatment interventions to her left shoulder, neck or low back. He limited his examination to her right shoulder because based on the documentation, he believed the evaluation was to be limited to the right shoulder. He did a cursory examination of her neck and found her range of motion to be full and unrestricted. Although claimant mentioned to Dr. Bieri that she was having left shoulder problems, he did not do any strength, sensation or loss of range of motion measurements.

Based on the *AMA Guides*, Dr. Bieri found that claimant had a 10 percent right upper extremity impairment for loss of range of motion, a 4 percent impairment for weakness of the supraspinatus muscle, and a 3 percent impairment for pain, which combined to a 17 percent permanent partial impairment of the right upper extremity. He considered 10 percent of her right upper extremity impairment to be preexisting, leaving her with a 7 percent permanent partial impairment to her right upper extremity that was directly attributable to her injury of December 2005 to April 2006.

He restricted claimant's shoulder level and overhead use of the right hand to no more than occasionally, without weight bearing. Lifting with the right upper extremity should be limited to 15 pounds occasionally, 10 pounds frequently, and no more than 5 pounds of constant lifting at chest level.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states:

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d(a) states in part:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other

or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

.....

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

.....

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-501(c) states: "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

ANALYSIS

Claimant initially treated with Dr. Vosburgh for this injury. Dr. Vosburgh only treated her right shoulder. His records do not contain complaints concerning claimant's left shoulder, neck or back. Claimant did report complaints of pain in both shoulders and neck to Dr. Curtis in May 2006. But when claimant was examined by Dr. Joyce in October 2006, he only diagnosed conditions in claimant's right shoulder. Likewise, Dr. Joyce only provided an impairment rating for claimant's right shoulder. In addition, Dr. Bieri, the court ordered independent medical examiner, only rated the right upper extremity. Although Dr. Bieri may have been confused about what he was being asked to do, he nevertheless did not change his opinion during his testimony that claimant's permanent impairment was limited to her right upper extremity, specifically her shoulder. Furthermore, during oral argument to the Board, counsel for both parties acknowledged that Dr. Bieri had been sent a joint letter which had been agreed to by both attorneys setting forth what Dr. Bieri was being requested to examine. Although that letter is not in evidence, neither party alleged that Dr. Bieri's examination was improper and should be repeated. No such request was made to the ALJ.

Dr. Vosburgh, claimant's treating physician, Dr. Joyce, who also was a treating physician, and Dr. Bieri rated claimant's preexisting impairment at 10 percent to the right

upper extremity. Dr. Bieri rated claimant's total resulting impairment at 17 percent to the right upper extremity. Subtracting the 10 percent preexisting from the 17 percent total rating yields a net of 7 percent attributable to claimant's subsequent work with respondent. The ALJ found Dr. Bieri's opinion to be the most credible in part because he was the court ordered independent or neutral examiner, but also because the opinions of Dr. Curtis and Joyce were flawed or less credible due to their having incomplete histories. While Dr. Bieri's examination of claimant may not have been ideal or as complete to the left shoulder and neck as it was to the right shoulder, the Board nevertheless agrees with the ALJ that overall, Dr. Bieri's opinion should be given the most weight in this instance.

CONCLUSION

Based upon the record presented, the Board finds claimant's permanent impairment of function for her work-related series of accident is 7 percent to her right upper extremity at the level of the shoulder.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated July 31, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
John D. Jurcyk, Attorney for the Self-Insured Respondent
Brad E. Avery, Administrative Law Judge